

# BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS

2401 PENNSYLVANIA AVENUE, NW  
SUITE 300  
WASHINGTON, DC 20037

TELEPHONE: (202) 663-7820  
FACSIMILE: (202) 663-7849

William A. Mullins

Direct Dial: (202) 663-7823  
E-Mail: [wmullins@bakerandmiller.com](mailto:wmullins@bakerandmiller.com)

December 20, 2005

VIA ELECTRONIC FILING

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, DC 20423-0001

**IMMEDIATE HANDLING REQUESTED**

Re: STB Docket No. AB-1066X  
*Central Illinois Railroad Company – Discontinuance Of Service Exemption –  
In Peoria County, IL*

Dear Secretary Williams:

Enclosed on behalf of Pioneer Industrial Railway Co., is a Request To Hold In Abeyance Pending Compliance With The National Environmental Policy Act of 1969, to be filed in the above-captioned proceeding. As can be seen from the certificate of service attached, copies of this Request are being served today on all parties of record. If there are any questions concerning this filing, please contact me by telephone at (202) 663-7823 or by e-mail at [wmullins@bakerandmiller.com](mailto:wmullins@bakerandmiller.com).

Sincerely,



William A. Mullins

Enclosures

cc: Daniel A. LaKemper, Esq.  
All Parties of Record

**BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON, DC**

---

**STB DOCKET NO. AB-1066X**

---

**CENTRAL ILLINOIS RAILROAD COMPANY-- DISCONTINUANCE OF SERVICE  
EXEMPTION – IN PEORIA COUNTY, IL**

---

**REQUEST TO HOLD IN ABEYANCE PENDING COMPLIANCE WITH THE  
NATIONAL ENVIRONMENTAL POLICY ACT OF 1969**

---

**Daniel A. LaKemper  
General Counsel  
Pioneer Industrial Railway Co.  
1318 S. Johanson Road  
Peoria, IL 61607  
Phone: (309) 697-1400**

**William A. Mullins  
David C. Reeves  
Baker & Miller PLLC  
2401 Pennsylvania Ave., N.W.  
Suite 300  
Washington, DC 20037  
Phone: (202) 663-7820  
Fax: (202) 663-7849**

**December 20, 2005**

**Attorneys for Pioneer Industrial  
Railway Co.**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON, DC**

---

**STB DOCKET NO. AB-1066X**

---

**CENTRAL ILLINOIS RAILROAD COMPANY-- DISCONTINUANCE OF SERVICE  
EXEMPTION – IN PEORIA COUNTY, IL**

---

**REQUEST TO HOLD IN ABEYANCE PENDING COMPLIANCE WITH THE  
NATIONAL ENVIRONMENTAL POLICY ACT OF 1969**

---

Comes now Pioneer Industrial Railway Company (“PIRY”), a party in this discontinuance proceeding, and requests that the Surface Transportation Board (“Board” or “STB”) hold in abeyance its issuance of a final decision in this proceeding, scheduled for December 30, 2005. PIRY’s request is based upon the fact that petitioner Central Illinois Railroad Company (“CIRY”) has not complied with the requirements of the National Environmental Policy Act of 1969 (“NEPA”) and the National Historic Preservation Act (“NHPA”) and the Board’s rules at 49 CFR Part 1105 implementing those acts. For the Board to proceed with final action on this matter on December 30, 2005, would contravene NEPA and NHPA and the Board’s own regulations.

**BACKGROUND**

On September 12, 2005, CIRY petitioned under 49 U.S.C. §10502 for exemption from 49 U.S.C. §§10903-05 to discontinue service over a segment of a rail line known as the Kellar Branch owned by the City of Peoria and the Village of Peoria Heights, IL (jointly, the “Cities”). The segment extends between the north line of Candletree Drive at approximately milepost 8.50

in Peoria, IL, and the north line of Jefferson Street at approximately milepost 2.21 in Peoria, IL, a distance of 6.29 miles in Peoria County, IL.

The discontinuance is the final step before the Board in the Cities' plans to remove the 6.29 miles of the existing Kellar Branch line, a line that totals 8.29 miles in length, to construct connecting track to provide online shippers with access to the Union Pacific Railroad Company, and to create a trail over the section where the track is to be removed. As stated in CIRY's September 12 exemption petition ("Petition"), "The exemption for discontinuance here sought is necessary to enable the owners of the Subject Rail Line . . . to convert the Line into a recreational trail." Petition at 2.

The Board issued a notice on September 30 ("Notice") in which it declared that it would issue a final decision on the Petition by December 30, 2005. The Notice also stated that offers of financial assistance ("OFA's") would be due ten days after service of a decision granting the Petition. The Notice also declared that "SEA has determined that this action [*i.e.* the discontinuance] is exempt from environmental reporting requirements under 49 CFR 1105.6(c)(2) and from historic reporting requirements under 49 CFR 1105.8(b)(3). Consequently, SEA concludes that this action does not require the preparation of an Environmental Assessment."

On September 12<sup>th</sup>, PIRY filed a notice of intent to file an OFA. CIRY promptly filed a motion to reject the OFA notice of intent. On November 21<sup>st</sup>, the Board issued a decision that, among other things, rejected PIRY's OFA request. The Board's decision stated that OFA's were not available in the context of a discontinuance, as opposed to an abandonment.<sup>1</sup> The Board's

---

<sup>1</sup> PIRY does not acquiesce in the Board's findings with respect to the availability of OFA's in the context of a discontinuance where no further abandonment authority is required to abandon and salvage the rails. PIRY is reserving its right to request reconsideration or seek court review.

decision also noted that it did not have jurisdiction over the abandonment of any portion of the Kellar Branch and that it only had jurisdiction over the discontinuance.<sup>2</sup>

### ARGUMENT

PIRY hereby submits that the rationale offered by CIRY for its failure to provide an environmental report, to undertake an environmental assessment, to provide an historic report or to otherwise comply with 49 CFR Part 1105 was incorrect and misleading, leading SEA to a faulty conclusion as well. The proposed action does not qualify for a categorical exclusion from NEPA. Accordingly, the Board needs to hold final action in this proceeding in abeyance until CIRY has fully complied with the requirements of NEPA and NHPA, and with the Board's rules at 49 CFR Part 1105 implementing those acts.

In CIRY's Petition, CIRY claimed that because it proposed a discontinuance, not an abandonment, no historic or environmental documentation was required, citing 49 CFR 1105.6(c)(6) and 49 CFR 1105.8. CIRY also relied upon Norfolk Southern Ry. Co. – Discontinuance of Service – In Sumter County, SC, STB Docket No. AB-290 (Sub-No. 264X), slip. op. at 2, n. 2 (STB served Aug. 30, 2005)(“Norfolk Southern”) as authority for its statement. SEA agreed with CIRY's claims and found the action to be exempt from environmental and

---

<sup>2</sup> The Cities' plans for the Kellar Branch are the subject of a series of decisions in several proceedings before the Board. City of Peoria and the Village of Peoria Heights, IL—Adverse Discontinuance—Pioneer Industrial Railway Company, STB Docket No. AB-878 (STB served Aug. 10, 2005)(granting the Cities' adverse application to discontinue service by PIRY over all 8.29 miles of the Kellar Branch); City of Peoria and the Village of Peoria Heights, IL—Adverse Discontinuance—Pioneer Industrial Railway Company, STB Docket No. AB-878 (STB served Nov. 18, 2005)(denying PIRY's petition to reopen and to hold in abeyance the Aug. 10 decision); and Central Illinois Railroad Company – Discontinuance Of Service Exemption – In Peoria County, IL, STB Docket No. AB-1066X (STB served Nov. 21, 2005)(in which the Board rejected PIRY's notice of intent to file an OFA). In neither of these proceedings was any environmental analysis issued by the Board.

historic reporting requirements, citing 49 CFR 1105.6(c)(2) and 49 CFR 1105.8(b)(3). Neither those regulations nor the Norfolk Southern case support CIRY's or SEA's conclusions.

Section 1105.6(c)(6) provides that no environmental documentation is normally necessary in actions that involve the "discontinuance of trackage rights **where the affected line will continue to be operated.**" (Emphasis supplied). In the Norfolk Southern case, the Board likewise found that transaction exempt from the environmental reporting requirements under (c)(6).<sup>3</sup> Thus, for Section 1105.6(c)(6) to support an exemption from the environmental requirements, the line must "continue to be operated" in order to qualify. Apparently CIRY's citation of Section 1105.6(c)(6) must have led SEA to believe that no significant changes in carrier operations would occur when SEA reached its conclusion that Section 1105.6(c)(2) justified CIRY's claimed exclusion from NEPA compliance.<sup>4</sup> In so doing, SEA ignored 49 CFR 1105.6(b)(3), which applies squarely to discontinuances of freight service such as CIRY proposes.

It is clear from the Petition, however, that once CIRY's discontinuance is granted and becomes effective, the Cities plan to abandon service, salvage the track, undertake construction

---

<sup>3</sup> While the Board's finding in Norfolk Southern cited Section 1105.6(c)(6), Norfolk Southern's two year out of service notice of exemption cited to Section 1105.6(c)(2) as the basis for the exemption. Because the line was an out of service line and was not going to continue to be operated, it is unclear why the Board used Section 1105.6(c)(6). Furthermore, Norfolk Southern's notice of exemption stated, "Further STB approval is required for NSR to abandon the Line." True copy of page 6 of Norfolk Southern's notice of exemption underlying the Norfolk Southern decision cited by CIRY attached hereto as Exhibit 1 pursuant to 49 CFR §1112.7.

<sup>4</sup> It should be noted that PIRY advised the Board in AB-878 that PIRY had planned to handle shipments for a large shipper on the section of the Kellar Branch involved here, and that elimination of this section of the Kellar Branch would reduce shippers' linehaul choices from eight carriers to one, reducing competition and perhaps rail loadings. Because the Board found that CIRY would substitute for PIRY's service, however, the Board did not consider the environmental impact of those matters.

and grading activity, and convert the corridor to a trail without any further Board review. *See* Petition at 2. Unless SEA's mistaken reliance upon the citations in CIRY's Petition to 49 CFR 1105.6(c)(6) and 49 CFR 1105.8(b)(3) is corrected, all of these actions can occur without environmental review under NEPA or consideration of historic preservation issues under NHPA. PIRY disputes that conclusion.<sup>5</sup>

We now know, and as the Board made clear in its November 21<sup>st</sup> decision, that the line will not continue to be operated if the discontinuance is granted. Instead, CIRY will discontinue service over, and the Cities intend to abandon and salvage, 6.29 miles of track and convert it to trail use. In such cases of discontinuance of freight service where the line will not continue to be operated, Section 1105.6(b)(3) requires preparation of an environmental assessment ("EA"). An EA has not been done and must be done to ensure compliance with NEPA. The Section 1105.6(c)(6) exclusion is simply inapplicable to the facts of this case.

Likewise, it is difficult to understand CIRY's assertion and SEA's conclusion that Section 1105.8(b)(3) provides an exemption from the historic reporting requirements. That provision applies to a transaction whereby a party is acquiring "trackage rights, common use of terminal tracks . . . which will not substantially change the level of maintenance of the railroad property." There is no indication in the regulation itself or the case law<sup>6</sup> that indicates Section

---

<sup>5</sup> As the party who operated over the Kellar Branch for the past seven years, and which still has a contractual right to operate over the line (an issue which is currently in litigation before an Illinois state court in Pioneer Industrial Railway Co. v. D.O.T. Rail Services, Inc., et al., LaSalle County Illinois Circuit Court No. 05-L-146), PIRY is concerned that any failure to fully follow NEPA and NHPA could impose unforeseen liabilities on PIRY. It may also impact any PIRY structures or property still owned or leased on the line that may be removed or salvaged without a proper NEPA or NHPA analysis.

<sup>6</sup> Norfolk Southern provides no support for CIRY and SEA's conclusion. That case granted an exemption pursuant to Section 1105.8; the section cited both by NS in its petition for exemption and the Board's August 30<sup>th</sup> decision, but there is no indication that NS or SEA relied upon Section 1105.8(b)(3).

1105.8(b)(3) is intended to grant an exemption from the historic reporting requirements in the context of a discontinuance proceeding, let alone where the line will not continue to be operated and 6.29 miles of track, sites, and structures will be abandoned and salvaged. The proposed action for which CIRY seeks an exemption is a transaction under Section 1105.6(b) (discontinuance of freight operations where the line will not continue to be operated). Accordingly, Section 1105.8(a) requires the filing of an historic report.

Because CIRY has filed no report, the Board cannot proceed with a decision on the merits of the abandonment until full compliance with the NEPA and NHPA processes has been achieved. The Board's predecessor specifically held that "the moment at which an agency must have a final statement ready is the time at which it makes a recommendation or report on a proposal for federal action" citing Kleppe v. Sierra Club, 427 U.S. 290, 406 (1976). Boston and Maine Corporation and Springfield Terminal Railway Company-Abandonment and Discontinuance of Service, Docket No. AB-32 (Sub-No. 36X), 1987 ICC LEXIS 51 (Nov. 19, 1987) at \*22. Accordingly, the Board and the ICC many times have rejected abandonment/discontinuance submissions which were filed without the required environmental reports. See, e.g., Fredonia Valley Railroad, Inc.-Abandonment Exemption-In Caldwell County, KY, STB Docket No. AB-592X, 2001 STB LEXIS 661 (served Aug. 9, 2001).<sup>7</sup> In fact, the Office of Proceedings is specifically empowered by 49 CFR 1011.7(b)(15) to "reject . . . petitions for exemption . . . for noncompliance with the environmental rules at 49 CFR part

---

<sup>7</sup> See also Longhorn Railway Company-Discontinuance Exemption-In Burnet County, TX, STB Docket No. AB-501X, 1997 STB LEXIS 2958 (served April 1, 1997). See generally Consolidated Rail Corporation-Abandonment Exemption-in Middlesex County, NJ, STB Docket No. AB-167 (Sub-No. 1184X) (served Jan 5, 2004) at \*1, n. 1; Iowa Northern Railway Company-Abandonment Exemption-In Tama and Benton Counties, IA, Docket No. AB-284 (Sub-No. 4X), 1994 ICC LEXIS 109 (served July 7, 1994) at \*1, n. 2, and Consolidated Rail Corporation-Exemption-Abandonment in Middlesex County, NJ, Docket No. AB-167 (Sub-No. 1085X), 1987 ICC LEXIS 205 (July 28, 1987) at \*1, n. 1.



1105.” Inasmuch as the Board has not exercised this rejection authority to this point, though it may still do so, the Board should, at the very least, hold this matter in abeyance until full compliance with NEPA and NHPA requirements are satisfied for, as the ICC said in its 1991 revision of the environmental rules, “We stay exemptions, or subject them to appropriate conditions that delay aspects of the transaction, where necessary to insure a fully informed decision on environmental issues.” Implementation of Environmental Laws, Ex Parte No. 55 (Sub-No. 22A), 7 ICC2d 807, 1991 ICC LEXIS 242 (July 19, 1991) at \*10. “We cannot ‘waive’ our responsibilities under the various environmental laws.” Id. at \*16.<sup>8</sup>

### CONCLUSION

This proceeding is the last step in a process by which the Board is being asked to lift its jurisdiction over operation of a rail line so that the line can be abandoned, salvaged, and converted to another use, all without environmental review. The prior steps in the process have occurred without environmental analysis. CIRY filed neither an environmental report nor an historic report in this proceeding either. The Board should not allow this major federal action to occur without a NEPA and NHPA analysis.

The regulations relied upon by CIRY and SEA to tentatively bestow upon CIRY’s proposal a categorical exclusion from environmental and historic review are inapplicable to the facts of this proceeding. Because those exclusions do not apply and CIRY has not complied with the requirements of NEPA, the Board cannot now proceed to a decision on CIRY’s

---

<sup>8</sup> On the other hand, the Board can waive applicable statutory deadlines when necessary. See CSX Transportation, Inc.-Abandonment Exemption-In Polk and McMinn Counties, TN, STB Docket No. AB-55 (Sub-No. 588X) (served Aug. 9, 2001) (granting exemption petitioner’s request to hold proceeding in abeyance to complete environmental consultations), and Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transportation Board, 2 S.T.B. 564, 1997 STB LEXIS 222 (served Sept. 2, 1997), at \*24 (creating a blanket exemption under 49 U.S.C. §10502 from statutory deadlines in order the allow for arbitration).

discontinuance request. Until such time as there has been full compliance with NEPA and NHPA, the Board should hold this proceeding in abeyance pending compliance with the Board's environmental regulations.

Respectfully submitted,

Daniel A. LaKemper  
General Counsel  
Pioneer Industrial Railway Co.  
1318 S. Johanson Road  
Peoria, IL 61607  
Phone: (309) 697-1400



William A. Mullins  
David C. Reeves  
Baker & Miller PLLC  
2401 Pennsylvania Ave., N.W.  
Suite 300  
Washington, DC 20037  
Phone: (202) 663-7820  
Fax: (202) 663-7849

Attorneys for Pioneer Industrial Railway Co.

## EXHIBIT 1

### **Labor Protection - §1152.50(d)(2)**

Since the Line has been out of service for over two years, NSR believes no employees will be adversely affected by the discontinuance of service over this Line. However, as a condition to the grant of the exemption and exercise of the discontinuance permitted in this matter, NSR will accept the imposition of standard labor protective conditions as set forth in *Oregon Short Line R. Co. - Abandonment - Goshen*, 360 I.C.C. 91 (1979).

### **Environmental and Historic Reports; Certifications - §1105.6, §1105.7, §1105.8, §1105.9 and §1105.11**

Because this is a discontinuance of service proceeding and not an abandonment proceeding, no environmental or historic documentation is required under 49 CFR 1105.6(c)(2) and 49 CFR 1105.8 and no transmittal letter is required under 49 CFR 1105.11<sup>2</sup>. Further STB approval is required for NSR to abandon the Line.

### **Service and Newspaper Notice Requirements Certification - §1152.50(d)(1-2)**

As the attached certification indicates, NSR certifies that the service and notice requirements of §1152.50(d)(1)(certain governmental agencies) and §1105.12 (newspaper notice) have been complied with.

---

<sup>2</sup>Recent Board notices of exemption stating this principle are STB Docket No. AB-55 (Sub-No. 654X), *CSX Transportation, Inc. - Discontinuance of Service Exemption - In Washington, DC*, served September 20, 2004; STB Docket No. AB-33 (Sub-No. 212X), *Union Pacific Railroad Company - Discontinuance of Service and Trackage Rights Exemption - In Los Angeles and Orange Counties, CA*, served March 31, 2004.

CERTIFICATE OF SERVICE

I, William A. Mullins, hereby certify that on this 20<sup>th</sup> day of December, 2005, copies of the foregoing Request To Hold In Abeyance Pending Compliance With The National Environmental Policy Act Of 1969 have been served by first class mail, postage prepaid, or by more expeditious means of delivery upon all parties of record to this proceeding identified on the Surface Transportation Board's website.

A handwritten signature in black ink, appearing to read 'William A. Mullins', is written over the printed name.

William A. Mullins  
Attorney for Pioneer Industrial Railway Co.